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In re Application of	:	OFFICE OF PETITIONS
Russke et al.	:	DECISION ON PETITION
Application Number: 10/531681	:	TO WITHDRAW HOLDING OF
Filing Date: 10/24/2005	:	ABANDONMENT
Attorney Docket Number: BU-	:	
11PCT	:	

This is a decision on the petition, filed on August 25, 2008, to withdraw the holding of abandonment in the above-identified application.

The application was held abandoned for failure to timely submit a reply to the final Office action mailed on February 12, 2008, which set a three (3) month shortened statutory period for reply. Notice of Abandonment was mailed on August 20, 2008.

Petitioners assert that a response to the final Office action was in fact timely filed. In support, petitioners have provided a copy of a postcard bearing an Office-date stamp of August 15, 2008, itemizing the filing of an amendment after final rejection, a Notice of Appeal, and a three (3) month extension of time. A copy of the reply asserted to have been timely filed was also provided with the subject petition.

A review of the Official file reveals that the papers filed on August 15, 2008, are located therein.

The date-stamped on the post card of August 15, 2008, is after the due date for the response. However, under 37 C.F.R. § 1.8(a)(1) correspondence is considered timely if: (1) the correspondence is mailed or transmitted prior to expiration of the set period for response by being properly addressed to the Patent and Trademark Office as set out in 37 C.F.R. § 1.1(a) and deposited with the U.S. Postal Service with sufficient postage as first class mail or transmitted to the Patent and Trademark

Office in accordance with 37 C.F.R. § 1.6(d); and (2) the correspondence includes a certificate for each piece of correspondence stating the date of deposit or transmission. The person signing the certificate should have a reasonable basis to expect that the correspondence would be mailed or transmitted on or before the date indicated.

The amendment after final rejection, Notice of Appeal, and three (3) month extension of time received on August 15, 2008, and with the present petition bear a proper certificate of mailing, dated August 12, 2008, in compliance with the requirements of 37 C.F.R. § 1.8(a)(1) as set forth above.

Accordingly the showing of record is that a reply was timely filed. Therefore there was no abandonment in fact. The holding of abandonment is withdrawn, and the Notice of Abandonment is vacated.

It is noted that an Advisory Action Before the Filing of an Appeal Brief was mailed on September 3, 2008, stating that the reply filed on August 15, 2008, fails to place the application in condition for allowance. However, since a Notice of Appeal was also filed, a proper reply to the final Office action mailed on February 12, 2008, has been filed.

Accordingly, petitioners have established that they submitted a timely reply to the final Office action in the form of a Notice of Appeal and a three (3)-month extension of time on August 15, 2008. **Therefore, the Office reminds applicant that the two (2)-month extendable period to file an appeal brief in compliance with 37 CFR 41.37, accompanied by the fee required by law, began to run on August 15, 2008, the date of filing the Notice of Appeal.** The Office notes that "37 CFR 41.37(a) does not permit the brief to be filed within the time allowed for reply to the action from which the appeal was taken even if such time is later." *MPEP* 1205. "Once appellant timely files a notice of appeal in compliance with 37 CFR 41.31, the time period for reply set forth in the last Office action is tolled and is no longer relevant for the time period for filing an appeal brief." *Id.* **Therefore, applicant is required to submit an appeal brief on or before March 15, 2009, accompanied by a request for an extension of time for response within the fifth month and fee to avoid abandonment of this application.** In other words, applicant, himself, started the running of the two-month extendable period

to file an appeal brief based upon the date applicant originally submitted the Notice of Appeal with the USPTO.

The petition is granted to the extent indicated above.

This matter is being referred to Technology Center Art Unit 3612 to await the filing of an appeal brief within the period noted above.

Telephone inquiries concerning this matter may be directed to the undersigned at (571)272-3231.

A handwritten signature in black ink, appearing to read "D. Wood", is positioned above the typed name.

Douglas I. Wood
Senior Petitions Attorney
Office of Petitions